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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

No. 432

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

DAN E. MAHER, Doing Business As
INTERSTATE BUSSES,
Appellee.

PETITION OF LLOYD C. WHITMAN, AMICUS CURIAE

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PETITION OF LLOYD C. WHITMAN AMICUS CURIAE

o the Honorable the Chief Justice
and Associate Justices of said Court:

Your petitioner, Lloyd C. Whitman, member of the
ar of this Court, represents clients interested in two
estions of law passed upon by this Honorable Court in
e above case, both of which questions are of great pub-
interest.

Your petitioner prays leave to make certain suggestions in the premises, *amicus curiae*, and herewith presents the same as suggestions and also as grounds for this petition; and suggests that the decision herein be modified accordingly.

I.

Section 206 (a) provides that application for a certificate may be made at any time within 120 days, and that "pending the determination of any such application the continuance of such operation shall be lawful," but that otherwise operation is unlawful without a certificate from the Commission.

Has this Honorable Court perhaps overlooked that to hold that the requirement of operation "since" June 1, 1935, requires operation after the effective date of the Act (October 15, 1935) is either to hold that the applicant must have *unlawfully* continued his operation *after* October 15, 1935, or to hold that the applicant must have filed his application *on* October 15, 1935, not, as Section 206 (a) provides, "within 120 days after this section shall take effect"?

The Statute forbids the operator to operate on and after October 15, 1935, *until* his application is filed. There is no provision requiring the applicant to resume the interrupted operation until he files his application.

It follows that the Statute speaks as of its effective date,—that "has so operated since" means has *on October 15, 1935*, so operated since June 1, 1935.

II.

As appears from the Court's opinion herein, appellee Maher has never anywhere claimed that the Commission should have taken any action other than to pass on Maher's claim of right under the "grandfather clause."

Upon the oral arguments in this Honorable Court appellee's counsel expressly disclaimed any such right. Whether the Commission should have taken such action in the instant case is therefore merely a moot question, and one upon which this Honorable Court has not had the services of interested counsel. Yet the Court's expression on the subject in the opinion herein is bound to embark the Commission and counsel for interested parties, for an indeterminable period of time, upon a sea of speculation as to what it may safely be assumed this Court will hold when the question is properly presented and argued.

Respectfully submitted,

LLOYD C. WHITMAN, *Amicus Curiae.*

STATE OF ILLINOIS }
COUNTY OF COOK } ss

Lloyd C. Whitman, affiant, on oath says that the facts alleged in the foregoing petition are true, and that on this 9th day of May, 1939, at Chicago, Illinois, affiant mailed, air-mail, copies of the foregoing petition to Mr. Wm. L. Harrison, 1206 Porter Building, Portland, Oregon, to the Attorney General of the United States, Washington, D. C. and to United States Interstate Commerce Commission, Washington, D. C.

LLOYD C. WHITMAN,
Affiant.

Subscribed and sworn to before
me this 9th day of May, 1939.

CATHERINE DEE,
Notary Public.

(NOTARIAL SEAL)

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SUPREME COURT OF THE UNITED STATES.

No. 432.—October Term, 1938.

The United States of America and Interstate Commerce Commission, Appellants, *vs.* Dan E. Maher, Doing Business as Interstate Busses.	Appeal from the District Court of the United States for the District of Oregon.

[April 17, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on appeal, under Section 238 of the Judicial Code as amended (28 U. S. C. § 345), to review a final decree, setting aside an order of the Interstate Commerce Commission, granted by a district court of three judges under the Motor Carrier Act, 1935, (49 U. S. C. Supp. § 305(h)), in connection with the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. § 45, 47a).

The application to the special facts of this case of what is colloquially known as "the grandfather clause" of the Motor Carrier Act is the substantive question at issue. There is a preliminary jurisdictional problem touching those phases of the relations of the Interstate Commerce Commission to the courts which are implied by the claim that the Commission had issued a "negative order."

Section 206 of the Motor Carrier Act, Act of August 9, 1935, 49 Stat. 543, forbids common carriers by motor vehicle subject to its provisions from engaging in interstate operations without a certificate of public convenience and necessity to be issued by the Interstate Commerce Commission under Section 207 of the Act. "The grandfather clause" of section 206, however, provides that "if any such carrier . . . was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation".

On January 24, 1936, the appellee, Maher, filed an applicatio
under the "grandfather clause" for a certificate to engage in th
transportation of passengers and baggage over U. S. Highwa
No. 99 between Portland and Seattle and intermediate point
After a hearing was had before a "Joint Board" composed o
members from the states involved (§§ 203(a), (19) and 205) a
which competing carriers and the Public Utilities Commission o
Oregon appeared in opposition to the application, and after
report was filed by the Joint Board with the Interstate Com
merce Commission recommending that the application be denie
the Interstate Commerce Commission, Division 5, on October 2
1937, found the facts to be as follows: From 1931 until Ma
29, 1936, the appellee had engaged in *bona fide* "anywhere-fo
hire" operations in Oregon with occasional entries into Washin
ton. There were rare trips to Seattle, no service at all to most
the intervening points, and no showing that passengers were tran
ported on return trips to Portland. On May 29, 1936, the appell
began his regular-route service between Portland and Seattle whi
he conducted regularly since that time. But upon the institution
the regular-route service between Portland and Seattle the a
pellee discontinued the "anywhere-for-hire" operations theretofo
conducted. Upon this showing Division 5 found that the servi
conducted by the appellee since May 29, 1936, was a different ser
ice from that conducted by him prior to that time, and therefo
concluded that he did not come within "the grandfather clause
And so, the Commission denied Maher's application and order
him "to cease and desist" from "all operations" as a common c
rier in interstate commerce. Thereupon the appellee filed t
present suit in the District Court for the District of Oregon agai
the United States and the Interstate Commerce Commission, pr
ing that the Commission's order be set aside and "any constr
tion thereunder" enjoined. The suit was disposed of on the ple
ings, the answer of the Commission having incorporated its rep
and orders. A majority of the District Court entertained jur
diction and held that the appellee was entitled to an "anywhe
for-hire" permit under "the grandfather clause" as well as
regular-route permit under Section 207. 23 F. Supp. 810. C
cuit Judge Haney found jurisdiction to review the cease and des
order, although not the order denying the certificate of convenie
and necessity, but sustained the Commission's view of the A

The jurisdictional problem presents another instance of the Interstate Commerce Commission having been invested with power to free a complainant of restrictions placed upon his conduct by a statutory scheme and having definitively rejected the claim for dispensation. The applicant before the Commission then came into court to "set aside" and "annul" the "order" of the Interstate Commerce Commission, claiming that the Commission's action was based on a wrong reading of the authority which the Act of Congress gave it. To the hearing of such a claim there is no jurisdictional barrier, as we have held today in *Rochester Telephone Corp.* v. *United States, ante* page —.[1]

On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206(a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206(a) from the requirements of Section 207.[2] The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and

[1] For reasons on which its legislative history appears to shed no light, the phrase "negative order" crept into Section 205 of the Motor Carrier Act in a context not covering the present situation.

[2] Sec. 206.(a) No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having author-

necessity. But under Section 206(a) the Commission must is "such certific[illegible]e without requiring further proof that public c venience and necessity will be served" by an applicant who "was bona fide operation as a common carrier by motor vehicle on Ju 1, 1935, over the route or routes or within the territory for wh application was made and has so operated since that time". this legislation Congress responded to the felt need for regulat interstate motor transportation through familiar administrative vices, while at the same time it satisfied the dictates of fairness affording sanction for enterprises theretofore established. Whet an applicant seeking exemption had in fact been in operation wit the immunizing period of the statute was bound to raise cont verted matters of fact. Their determination Congress entrusted the Commission. The legal issues presented by this record are atively simple once the somewhat confused operations of the ap lee's business are clearly defined.

Invoking the "grandfather clause" the appellee sought from Commission a certificate authorizing continuance of his regular se ice between the fixed termini of Portland and Seattle on U. S. Hi way 99. But the Commission found that the regular operation o this route had only been instituted on May 29, 1936. Theretof and including the crucial period prior to June 1, 1935, the appe

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ity to grant or approve such certificates and if such carrier has obtained s certificate from such board. Such transportation shall, however, be other subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commiss be verified under oath, and shall be in such form and contain such informa and be accompanied by proof of service upon such interested parties as Commission shall, by regulation, require. Any person, not included within provisions of paragraph (a) of this section, who or which is engaged in tr portation in interstate or foreign commerce as a common carrier by m vehicle when this section takes effect may continue such operation for a pe of one hundred and twenty days thereafter without a certificate and, if ap cation for such certificate is made to the Commission within such period, carrier may, under such regulations as the Commission shall prescribe, conti such operation until otherwise ordered by the Commission.

Sec. 207.(a) Subject to section 210, a certificate shall be issued to qualified applicant therefor, authorizing the whole or any part of the op tions covered by the application, if it is found that the applicant is fit, will and able properly to perform the service proposed and to conform to the visions of this part and the requirements, rules, and regulations of the C mission thereunder, and that the proposed service, to the extent to be aut ized by the certificate, is or will be required by the present or future pu convenience and necessity; otherwise such application shall be denied: *vided, however,* That no such certificate shall be issued to any common car of passengers by motor vehicle for operations over other than a regular r or routes, and between fixed termini, except as such carriers may be authori to engage in special or charter operations.

had been engaged in quite different services from those for which it asked a certificate, namely, "an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington" over any route adapted to a particular trip, but using at least for part of the distance U. S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee's regular route was established. Applying these findings which are binding here, the Commission ruled that the appellee did not bring himself within the privilege of the "grandfather clause." In making this application of the statute, the Commission properly construed it.

The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the "route or routes" for which an application under the "grandfather clause" is made as against operations "within the territory", Congress plainly adopted the familiar distinction between "anywhere-for-hire" bus operations over irregular routes and regular route bus operations between fixed termini.[3] Such recognition is implicit also in the provision of Section 208(a) that "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular "anywhere-for-hire" service was not "so operated", as required by Section 206, when the Commission passed upon the application for a "grandfather" certificate, the Commission rightly rejected the application.

But the District Court set aside the Commission's order on another ground. It held that when the Commission rejected appellee's claim under the "grandfather clause" another provision of Section 206(a) sprang into relevance, to wit "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such

[3] See *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 699; *Coordination of Motor Transportation*, 182 I. C. C. 263, 274. See also *Coordination of Motor Transportation*, Sen. Doc. No. 43, 72d Cong., 1st Sess., pp. 34-35; *Regulation of Transportation Agencies*, Sen. Doc. No. 152, 73d Cong., 2d Sess., pp. 176, 191-192.

certificate shall be issued or denied accordingly." We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application for a certificate based on "public convenience and necessity" when the applicant himself only seeks the favor of the "grandfather clause" and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the "grandfather clause".

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.